(3)

NO. 91-284

In the Supreme Court of the United States

OCTOBER TERM, 1991

MARY E. BARGER,
Plaintiff-Petitioner

v.

PETROLEUM HELICOPTERS, INC.
and
AMERICAN HOME ASSURANCE COMPANY,
Defendants-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION

VANCE E. ELLEFSON
C. THEODORE ALPAUGH, III
Ellefson, Pulver & Staines
3838 N. Causeway Boulevard
Suite 3000
Post Office Box 8550
Metairie, La. 70011-8550
Telephone: (504) 833-3433
Attorneys for
Defendants-Respondents

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether the appellate court correctly held that there is no exception to Section 33(g) of the Longshore and Harbor Workers' Compensation Act requiring that all claimant settlements with third-persons which expose the claimant's employer to further compensation payment must have the written approval of the employer and the compensation insurance carrier to avoid ending the claimant's entitlement to compensation.

LIST OF PARTIES

The undersigned counsel of record for Petroleum Helicopters, Inc. and American Home Assurance Company, defendants/respondents herein, certify that the following parties have an interest in the outcome of this case:

1. Mary E. Barger -Plaintiff/Petitioner
2. Mary Ellen Blade - Attorney for Plaintiff/Petitioner
3. Hubert Oxford, III - Attorney for Plaintiff/Petitioner
4. Petroleum Helicopters, Inc. - Defendant/Respondent
5. American Home Assurance Company - Defendant/Respondent
6. Vance E. Ellefson - Attorney for Defendants/Respondents
7. C. Theodore Alpaugh, III - Attorney for Defendants/Respondents
8. United States Department of Labor, Office of Workers Compensation
9. Samuel J. Oschinsky - Attorney for the Department of Labor
10. Donald Shire - Attorney for Department of Labor
11. Benefits Review Board
12. Solicitor General of the United States

ELLEFSON, PULVER & STAINES

Of Counsel

VANCE E. ELLEFSON
C. THEODORE ALPAUGH, III
3838 N. Causeway Boulevard
Suite 3000
Post Office Box 8550
Telephone: (504) 833-3433
Attorneys for Defendants/
Respondents

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

STATUTES

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BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Justices Of The Supreme Court Of the United States of America:

JURISDICTION

The opinions and judgment of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*,, were rendered in this case on March 29, 1991. The Petition for Writ of Certiorari was docketed on June 29, 1991. The Petition for Writ of Certiorari was filed on June 27, 1991.

STATUTE INVOLVED

33 U.S.C. §933(g):

(g) Compromise obtained by person entitled to compensation.

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and employer's carrier, before the settlement is executed and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

STATEMENT OF THE CASE

Walter Barger was killed in April, 1976, when the helicopter he was piloting crashed on a flight between platforms fixed to the seabed of the Outer Continental Shelf in the Gulf of Mexico. Mr. Barger was employed by Petroleum Helicopters, Inc. (hereinafter "PHI") which, after his death, voluntarily instituted payment of Longshore and Harbor Workers' Compensation Benefits to

his widow and children. Mrs. Barger subsequently filed suit against Bell Helicopter Textron (hereinafter "Bell"), the manufacturer of the helicopter, and PHI. Her theory of liability against PHI was that the helicopter was a "vessel" and that Mr. Barger was a "seaman" within the meaning of the Jones Act.[1]

Upon institution of the suit, Mrs. Barger's counsel was advised that Longshore benefits were being paid but that, if the Bargers were contending that Mr. Barger was a "seaman", Longshore benefits were not due and would be terminated. Counsel replied that the plaintiff's position was that Mr. Barger was a "seaman" and that he was covered by the Jones Act. Longshore benefits were then discontinued.

On the eve of trial, Bell and the plaintiff settled their claims.[2] In return for release from all liability, Bell agreed that, if cast in judgment, it would pay Mrs. Barger $225,000.00. In turn, Mrs. Barger agreed not to execute any judgment against Bell or to seek anything over the amount agreed. Bell's counsel was present at trial but took virtually no part in the proceedings. Bell and PHI were cast in judgment by the district court, which held the aircraft to be a "vessel" and Mr. Barger a "Jones Act seaman." Damages in the amount of $660,368.00 were assessed, with Bell bearing 20%, or $132,073.60.[3]

PHI appealed to the United States Court of Appeals

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[1] 46 U.S.C. §688.

[2] *Barger v. Petroleum Helicopters, Inc.*, 514 F. Supp. 1199 1212, f.n. 32 (E.D. Tx. 1981). Petitioner, on page 5, has cited the judgment entered on April 19, 1983, to establish that settlement was entered into *after* trial. However, in his original opinion on May 21, 1981, Judge Fisher correctly found that settlement was entered into *prior* to trial.

[3] *Id.*

for the Fifth Circuit which reversed the finding that the helicopter was a "vessel" and that Mr. Barger was a "Jones Act seaman."[4] Bell paid Mrs. Barger in accordance with the settlement agreement, receiving a full release of all liability.

On December 12, 1982, Mrs. Barger instituted a claim against PHI under the Longshore and Harbor Workers' Compensation Act,[5] (hereinafter "LHWCA"), claiming she had exhausted any credit for the settlement with Bell. PHI opposed the claim on the basis that Mrs. Barger's settlement with Bell was a compromise within the meaning of §33(g) of the Act to which PHI, the employer, had not agreed.[6] The Deputy Commissioner, however, awarded compensation benefits to Mrs. Barger, on the basis that Mrs. Barger was not a "person entitled to compensation" at the time of the compromise. An Administrative Law Judge held that PHI was barred from raising the compromise between Bell and the plaintiff.[7] The Benefits Review Board affirmed the Administrative Law Judge.[8] PHI appealed the decision and the Fifth Circuit reversed,[9] for the reasons stated in its opinion in

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[3] *Id.*

[4] *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), *cert. den.*, 461 U.S. 958, 103 S. Ct. 2430, 77 L. Ed. 2d 1316 (1983).

[5] 33 U.S.C. §901, *et seq.*

[6] 33 U.S.C. §933(g) (hereinafter "33(g)").

[7] *In the Matter of Walter Barger, Deceased Claimant v. Petroleum Helicopters, Inc., Employer and American Home Assurance Company, Carrier,* case No. 87-LHC-597, OWCP No. 73-9001 (Nov. 18, 1987), Appendix "D" to Petition for Certiorari.

[8] *Mary E. Barger, Widow of Walter Barger v. Petroleum Helicopters, Inc. and American Home Assurance Co.*, Decision and Order, BRB No. 88-101 (Nov. 22, 1989), Appendix "E" to Petition for Certiorari.

[9] *Petroleum Helicopters, Inc. v. Barger*, 910 F.2d 276 (5th Cir. 1990).

Nicklos Drilling Co. and Compass Insurance Co. v. Cowart,[10] which was consolidated with *Barger* for rehearing en banc. On March 29, 1991, the Fifth Circuit affirmed the panel opinions in both cases, holding Section 33(g)'s requirement of prior written approval applies regardless of whether or not the employer/carrier is paying LHWCA benefits at the time of the settlement.[11]

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

I. THE APPELLATE COURT PROPERLY HELD THAT THERE ARE NO EXCEPTIONS TO THE WRITTEN APPROVAL REQUIREMENT OF §33(g).

There is no dispute that Petitioner in this case entered into a settlement agreement with Bell. There is no dispute that the settlement agreement in question was made without the approval of PHI. Nor is there any dispute that the settlement agreement was for *less* than the compensation to which Mrs. Barger would have been entitled. The sole question before this Court is really whether there is any exception whatsoever to the written approval requirement of §33(g), where the settlement is for an amount less than the compensation to which the claimant would otherwise be entitled.

Petitioner argues that this Court should follow an administrative interpretation of §33(g) which, if allowed to stand, would completely ignore the clearly expressed Con-

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[10] 907 F.2d 1553 (5th Cir. 1990).

[11] *Nicklos Drilling Co. v. Cowart,* 927 F.2d 828 (5th Cir. 1991).

gressional intent of the pertinent provisions of the LHWCA, decisions by appellate courts on this issue and the plain meaning of the words of the statute. An examination of the history of the LHWCA in general, and §33(g) in particular, clearly shows the error of Petitioner's contentions.

§33(g), as enacted in 1927 as part of the Longshoremen's and Harbor Workers' Compensation Act, read:

> If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representation would be entitled under this Act, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.[12]

The incorrect reference in §33(g) to "subdivision (e)" was changed in 1959 to "subdivision (f)".[13]

Prior to 1970, the courts strictly enforced §33(g). Reading the statute as written, mere discontinuance or abandonment of a third-party claim by an employee was held not to discharge the employer's liability for compensation, in the absence of prejudice to the employer.[14] However, when a third-party claim was actually settled

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[12] Longshoremen's Act of 1927, Ch. 509, §33(g), 44 Stat. 1440.

[14] Longshoremen's Act Amendments of 1959, Pub. L. No. 86-171, §33(g), 73 Stat. 391, 392. Subdivision (f) requires the employer to pay the difference between the amount received from the third-party compromise and the amount of compensation due under the Act, if greater than the amount received from the third-party.

14 *Chapman v. Hoage*, 296 U.S. 526, 56 S. Ct. 333, 80 L.Ed 370 (1936); *American Lumbermen's Mut. Cas. Co. v. Lowe*, 70 F.2d 616, 618 (2d Cir. 1934).

without obtaining the employer's consent, the federal courts refused to read any requirement of prejudice into §33(g) and enforced it strictly according to its terms.

> Section 33 deals exclusively with compensation for injuries where third-persons are liable. It covers the whole field; and beyond all possibility of doubt subsection (g) was designed to protect the rights of an employer in the situation where the employee or his dependent, having elected to seek recovery against a third-party wrongdoer, releases the third-party without the employer's consent. A showing of damage - or the absence of it - is beside the point in such a case. Petitioner, having compromised and settled her claim against the third-party without the approval of the employer or carrier, is not now in a position to demand anything more - if for no other reason thanbecause the statute clearly says so.[15]

The Fourth Circuit has recognized that the purpose of §33(g) was to prevent an employee or his beneficiaries from independently managing pending litigation or affecting the course of prospective litigation designed for the use of the employer as well as the employee or his dependents.[16]

> Where ... there has been a judicial determination of the damages, there is no possibility whatsoever of prejudice to the employer from the judgment creditior's subsequent consent to a diminution in payment. The employer has no interest in it. The reduction is at the plaintiff's sole expense *and does not lessen the employer's right of set-off,* and the employer and his insurance carrier are not otherwise affected. The situation does not fall

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[15] *Marlin v. Cardillo,* 95 F.2d 112, 115 (D.C. Cir. 1938).

[16] *Bell v. O'Hearne,* 284 F.2d 777 (5th Cir. 1960).

within the purpose of §933(g).[17]

The employer and carrier were still entitled to credit for the full amount of the judgment. Recovery of the difference between that amount and the compensation due under the Act was not precluded by the failure to obtain the employer's consent to the discount.[18]

An employee's survivor's acceptance of a remittitur of a judgment to avoid a new trial did not constitute a "compromise":

> An order of remittitur is a judicial determination of recoverable damages; it is not an agreement among the parties involving mutual concessions. §33(g) protects the employer against his own employee's accepting too little for his cause of action against a third-party. That danger is not present when damages are determined, not by negotiations between the employee and the third-party, but rather by the independent evaluation of a trial judge.[19]

The settlement recommendations of a trial judge, when accepted by the parties in a third-party claim and reduced to a consent judgment was held to be a private compromise rather than a judicial determination. The consent judgment did not result from the Judge's independent finding of value after a full presentation of the evidence,

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[17] *Id.* at 780 (emphasis added), *see e.g., Edmond v. Compagnie General Transatlangigue*, 443 U.S. 459, 99 S. Ct. 2753, 61 L.Ed. 2d 521 (1979), under which claimant's claim would be premature because the proper credit is based on the total judgment of $660,368.00, and not claimant's compromise.

[18] *Id.* at 781.

[19] *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, 88 S. Ct. 1140, 1145, 20 L.Ed 2d 30 (1968).

but was a suggested figure which the parties were free to accept or reject. Where the employer's written consent to the compromise figure had not been obtained, the employer was not obligated to pay compensation.[20]

A series of decisions began to undermine this interpretation of §33(g). In *Robinson Terminal Warehouse Corp. v. Adler,*[21] an employer's insurer which was also the carrier for the third-party defendant vessel was held to have approved a compromise and was estopped from relying on §33(g) when it issued its "written" draft in payment of the agreement settlement figure. Congress eliminated such "estoppel" decisions by amending the Act for the first time since its enactment forty-five years earlier. The 1972 Amendment to the Act changed §33(g) to read as follows:

> If a compromise with such third-person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if the *written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of, or prior to, such compromise on a form provided by the Secretary and filed in the office of the Deputy Commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.*[22]

With the 1972 Amendments, a check issued by the

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[20] *Morauer & Hartzell, Inc. v. Woodworth,* 439 F.2d 550 (D.C. Cir. 1970), *cert. dis.,* 404 U.S. 16, 92 S. Ct. 170 (1971).

[21] 440 F.2d 1060 (4th Cir. 1970).

[22] Longshoremen's Act Amendments of 1972, Pub. L. 91-576, §15(h), 86 Stat. 1251, 1262. The language added by the 1972 Amendment is underlined.

employer's insurer would no longer be considered "written approval." Approval had to be on a Department of Labor form, filed with the Office of Workers' Compensation Programs. The employer's or insurer's knowledge of or participation in the third-party settlement would not create estoppel. The employee was affirmatively required to obtain written approval on a specified form. A third-party insurance carrier would no longer be able to dispense with the employer's right to approve the settlement, even where the carrier also insured the employer. The approval of the employer and its carrier was required. Approval by the employer now had to be obtained at a specific time in the settlement process ("at the time of, or prior to such compromise") and filed within a specific time afterwards ("within thirty days after such compromise is made").

In 1977, the Benefits Review Board began what has every appearance of a concerted attempt to do away with §33(g). In *O'Leary v. Southeast Stevedore Co.*,[23] the Board began its work to create its own definition of "person entitled to compensation" thereby virtually eliminating the effect of §33(g). In *O'Leary,* an Administrative Law Judge determined that, because the employer had "never paid compensation voluntarily or pursuant to an award prior to the third-party settlement"[24] the claimant survivor was not a "person entitled to compensation" at the time of the settlement and was thus not required to obtain the employer's consent under §33(g). *O'Leary* purported to read §33(g) "in line with the humanitarian and beneficent purposes of the Act", which had been:

> Clearly written with the underlying concept that the employer upon being informed of an injury will voluntarily begin to pay compensation.[25]

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[23] 7 BRBS 145.

[24] 7 BRBS 148.

[25] *See* 33 U.S.C. §914(a).

> The provisions of §33 similarly contemplate either payments being made voluntarily or pursuant to an actual award.[26]

The Board argued that requiring written consent to be obtained from an employer who had not paid benefits prior to a settlement "'could severely prejudice a claimant's rights.''[27] The Board went on to state:

> [A] claimant not being paid any compensation ... would be afraid to make a third-party settlement for in doing so he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third-party settlement without the employer's consent to obtain money ... Surely, Congress by requiring written consent could not have contemplated such a result.[28]

The Board's decision in *O'Leary* substitutes a phrase cast in the past tense for a phrase denoting future expenctancy. The Board substitutes in the statute for the language "person entitled to compensation", the phrase "person paid compensation voluntarily or pursuant to an award prior to the third-party settlement." The Board's sleight of hand not only flies in the face of English usage, it contradicts the Board's own statements in other cases. In 1978, the Board had no difficulty differentiation between "language of entitlement" and language of "actual receipt." Reviewing portions of the House and Senate Committee Reports on the 1972 Amendment to §8(d) of the Act, the Board stated:

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[26] 7 BRBS at 147.

[27] 7 BRBS at 149.

[28] *Id.*

> [t]he analysis of the 1972 Amendment contained in [the] Senate Report ... uses language of entitlement, not of actual receipt.
>
> > Section 8(d) of the Act ... is amended to provide for payment of survivor benefits in situations where a worker who *is entitled to benefits* for permanent partial disability dies from causes other than the injury.[29]
>
> The House Committee ... likewise speaks of entitlement to disability payments with no mention that the decedent must be actually receiving permanent partial compensation.[30]

Similar interpretations of "language of entitlement" appear in Federal decisions reported both before and after Congress drafted the Longshoremen's Act of 1927.[31] More recent cases have addressed the same question in a similar manner.[32]

O'Leary makes no reference to prior Second, Fourth and Sixth Circuit cases interpreting the phrase "entitled to compensation." These cases addressed the relationship of §33 with §44 of the Act.[33] Under §33(c), the §44(c) payment effected an immediate assignment of the third-party cause of action for the death of an employee for which no

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[29] Emphasis added.

[30] *Acuri v. Cataneo Lines Service Co.*, 8 BRBS 102, 111 (1978).

[31] In *Hibberd v. Slack*, 84 Fed. 571, 579 (C.C. S. D. Cal. 1897)

[32] *Merrill v. United States*, 338 F.2d 372, 375-76 (Ct. C.L. 1964); *McMillen v. Califano*, 443 F.Supp. 1362, 1367 (C.O.N.Y. 1978).

[33] §44(c) of the Act, 33 U.S.C. §944(c), requires payment by the employer into a special trust fund whenever the Department of Labor:

> determines that there is no person entitled under this Act to compensation for the death of an employee which would otherwise be compensable under the Act.

person is entitled to collect compensation from the decedent's representative to the employer. These cases are impossible to reconcile with *O'Leary*.

Branham v. Terminal Shipping Co.[34] is a Fourth Circuit case in which the employer was ordered to make a §44(c) payment. The deceased employee's surviving representative had settled her third-party death claim for more than the maximum compensation to which she was entitled under the Act. The effect of the settlement was to simultaneously extinguish any entitlement to compensation and any cause of action which could have been assigned to the employer under §33(c).

The argument put forward against the employer was that the effect of the settlement was to create a situation in which there was no longer any "person entitled to compensation" and the §44(c) payment was therefore required.

The employer argued that entitlement to compensation was determined prospectively at the time of injury (or death entitling the dependent to death benefits), not at the time the question of entitlement was resolved by an Administrative Order.

Relying in part on a Second Circuit ruling,[35] the Fourth Circuit held:

> [i]t is not to be presumed that Congress intended in enacting the Longshoremen's Act that the question of whether there was any person entitled to compensation should be determined by any act of a dependent, such as the election of the mother in this case, or in any way other than by consider-

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[34] 136 F.2d 655 (4th Cir. 1943).

[35] *Federal Mut. Liab. Ins. Co. v. Locke*, 60 F.2d 895 (2d Cir. 1932).

> ing the facts that existed at the time of the injury to the employee.[36]

It is clear that Congress intended non-paying employers to receive the benefit of §33 from the inception of the Act in 1927. As originally enacted in 1927, §33(a) contained the "person entitled to compensation" language still present today.

> If on account of a disability or death for which compensation is payable under this Act, *the person entitled to* such *compensation* determines that some person other than the employer is liable in damages, he may elect, by giving notice to the Deputy Commissioner in such manner as the Commission may provide, *to receive such compensation or to recover damages against such third-person.*[37]

Under the 1927 Act, acceptance of compensation operated immediately to assign to the employer "all rights of the *person entitled to compensation* to recover damages against such third-person, whether or not the *person entitled to compensation* has notified the Deputy Commissioner of his election."[38] A claimant could not accept compenation and at the same time retain the right to pursue and compromise a third-party action. However, §33(g), from 1927 to the present time, has always required the same "person entitled to compensation" to abtain the

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[36] At 136 F.2d 655. *See also, Reiss Steamship Co. v. Cyr,* 138 F. Supp. 834 (M.D. Ohio 1954), *aff'd.* 229 F.2d 849 (6th Cir. 1956), decided under the 1938 version of §33(f), holding that entitlement as used in the phrase "person entitled to compensation" is determined that the time of the claimant's election to sue the third-party, not at some later time when the right to deficiency compensation is ajudicated.

[37] Longshoremen's Act of 1927, Ch. 509, §33(a), 44 Stat 1440 (emphasis added).

[38] *Id.* §33(b) (emphasis added).

employer's written approval in order to preserve the §33(f) right to an award of compensation above and beyond the third-party recovery.

In 1938, §33(b) of the Act was amended, in the words of Congress:

> to remove possible cause of complaint regarding the operation of the provision in subdivision (b) of §33 in making the mere acceptance of compensation work automatically an assignment to the employer off rights of action against the third-party tort feasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third-party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the Deputy Commissioner, thus giving opportunity to the injured person, or to the injured person in case of death to consider the acceptence of compensation from the employer with the resulting loss of right to bring suit and damages against the third-party, or a refusal of compensation so as to pursue the remedy against the third-party, alleged to be liable for the injury.[39]

The amended §33(b) provided:

> Acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third-person.[40]

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[39] H.R. Rep. No. 1945, 75th Cong. 3d Sess. 9 (1938).

[40] Longshoremen's Act Amendments of 1938, Ch. 685, Sec. 12, 52 Stat. 1164, 1168.

As long as a claimant accepted voluntary payment without an award, he preserved his option to pursue the third-party claim. Once the claimant elected to pursue the third-party claim under §33(a), compensation ceased as §33(a) was unchanged by the 1938 Amendments. If the employer refused voluntarily to pay and a claimant obtained compensation under an award, the §33(b) assignment took effect, precluding a third-party action by the claimant. Here, again, a "person entitled to compensation" in a position to compromise a third-party suit could not be receiving compensation either voluntarily or pursuant to an award at the time of settlement. *Nevertheless, §33(g) still required the employee to obtain the non-paying employer's written consent to the compromise.*

Section 33 was amended again in 1959. Section 33(g) remained unchanged except to correct the erroneous reference to subdivision (e).[41] Congress removed the §33 (a) election from the Act. The House report stated:

> In such a case, that is, injury through a third-party, under the present statute [the worker] or his survivors are obliged to elect either to receive compensation or to sue the third-party. Many times, in spite of the fact that they have a good cause of action and could receive a greater sum of money against the third-party, they are afraid to do so because in the event of the loss of the case, they would then have neither recovery in that suit nor the compensation. A further evil sometimes occurs when these people find it necessary to practically sell their claim in order to obtain support during the course of the case.[42]

Under the amended §33(a), acceptance of compensation

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[41] See fn. 13.

[42] H.R. Rep. No. 229, p. 2.

under an award no longer created an immediate assignment to the employer of the third-party cause of action[43]. Assignment occurred six months after an award unless the claimant had commenced a third-party suit.[44]

The 1959 Amendment did not change the "person entitled to compensation" wording found in §33. Petitioner contends that it is "black letter law" that in enacting or amending statutes, Congress is held to have considered the existing judicial interpretations of statutory language. Petitioner and the BRB, however, ignore the judicial interpretation in *Branham* and related cases construing the entitlement conferred by the phrase "person entitled to compensation" in relation to facts existing *at the time of the injury,* which was then "and for some time thereafter" the existing interpretation.[45]

For the first time in the thirty-two year history of the Act, it was possible for a "person entitled to compensation" to receive compensation while pursuing a third-party claim. There has been no direct effect on §33(g) by the 1959 Amendments. However, the changes to other subdivisions of §33 meant that claimants settling third-party suits would now, for the first time, be required to obtain approval from the class of employers paying compensation. *Approval by the class of non-paying employers continued to be required as it had for the previous thirty-two years.*

A person's "entitlement to compensation" under the Longshore Act is not subject to an employer's determination of whether to pay or controvert the claim. Nor is the claimant's §33(g) obligation to obtain approval of a settle-

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[43] Longshoremen's Act Amendment of 1959, Pub. L. No. 86-171, §33(a), 73 Stat. 391.

[44] *Id.* §33(b).

[45] At 136 F.2d 655.

ment dependent on whether or not the employer is paying compensation at the time. Section 14(a) of the Act affords the employer the right to controvert a claim within fourteen days of "knowledge of the alleged injury or death" in accordance with §14(d). The Fifth Circuit has recognized that the Act encourages the voluntary payment of benefits in order to accomplish its purpose to assure prompt aid to an employee when his need is greatest.[46] However, the Fifth Circuit has also recognized the right of an employer to controvert a claim and the existence of administrative procedures for doing so.[47]

Subsequent to the Board's decision in *O'Leary*, the 1984 Amendments to the Longshore and Harbor Workers' Compensation Act were passed.[48] Prior to the Amendments, the entirety of §933(g) read as follows:

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the Deputy Commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

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[46] *Louviere v. Shell Oil Co.*, 509 F.2d 278, 283 (5th Cir. 1975).

[47] See §914(d); 20 C.F.R. 702 (1984). *See also, Peters v. North River Ins. Co. of Morristown, New Jersey*, 764 F.2d 306 (5th Cir. 1985).

[48] Public law 98-426 (September 28, 1984).

Section 21(d) of the 1984 Amendments to the LHWCA altered §933(g) to its present form. These amendments were initially interpreted by the Board in *Dorsey v. Cooper Stevedoring Co.*[49] Despite the obvious changes in the statute, the Board chose to read each subsection of §33(g) as a separate provision having no relation to the other.[50] The Board's interpretation distinguished between a "person entitled to compensation" under subsection (1), where formal approval of the settlement was required, and a person not entitled to compensation under subsection (2), where mere notice of the settlement would suffice.[51] The Board attempted to support its interpretation by stating that the Legislative history" ... contains nothing conclusive regarding the changes in Section 33(g)."[52] The Board went on to state that it felt that subsection (g)(2) would otherwise be rendered superflous:

> If subsection (g)(2) were interpreted to require written notice regardless of whether claimant was receiving compensation at the time of the third-party settlement, as employer argues, the phrase requiring notice of any settlement or judgment would be rendered superflous since the written approval requirement makes any additional notification unnecessary.[53]

The Board further believed that its holding that the necessity for written approval arose only when compensation is being paid was consistent with policy concerns.[54]

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[49] 18 BRBS 25 (1986).

[50] *Id.* at 29.

[51] *Id.*

[52] *Id.* at 30, n. 7.

[53] *Id.*

[54] *Id.* at 31.

However, this interpretation disregards the point raised with regard to the 1959 Amendments which allowed a "person entitled to compensation" to pursue a third-party claim for the first time. At the same time, the 1959 Amendments continued, without change, the requirement of approval by non-paying employers.

The Board's holding, essentially, is that the statute as written does not make sense. Contrary to the assertions of the Board, the Legislative history of the 1984 Amendments clearly shows the intent of Congress in amending §933(g):

> Section 19 amends Section 33 of the Act ... This Section further provides that if a claimant who has brought a cause of action against a third-party has entered into a settlement in an amount less than the amount to which the claimant would be entitled under the Longshore Act, the employer shall be responsible for additional compensation *only* if the employer has approved the settlement agreement.[55]

Unlike the Benefits Review Board, the Fifth Circuit, in its published opinions on the subject, found the intent of Congress to be quite easily ascertainable. In the first opinion on the issue, *Petroleum Helicopters, Inc. v. Collier,*[56] the court spoke to the issue of the revised §933(g) and stated:

> We ... note that the legislative history of the 1984 Amendments to the LHWCA admits no exception to the written approval requirement.[57]

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[55] H.R. Rep., No. 98-570, p. 1, 98th Congress, 2 Sess. 30-31, *reprinted in*, [1984] U.S. Code Cong. & Ad. News, 2734, 2763-64 (Emphasis added).

[56] 784 F.2d 644 (5th Cir. 1986).

[57] *Id.* at 644.

In *Collier,* the Fifth Circuit clearly viewed Subsection (2) as a reiteration and explanation of subsection (1), rather than a separate provision addressing situations differing from those addressed by subsection (1). The Court stated:

> Moreover, there is nothing in the language of §933 to support ... [an] exception to the unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third-party tort feasor. To the contrary §933(g)(1) is brutally direct: "the employer shall be liable for compensation ... *only* if written approval of the settlement is obtained from the employer and the employer's carrier." (Emphasis added.) As if the language of §933(g)(1) weren't clear enough, the mandatory nature of the written approval requirement is reiterated in §933(g)(2) so that the two provisions frame an unmistakable scheme:
>
> If ... the worker desires to settle the claim for *less* than the total compensation owed by the employer, the worker must obtain the written approval of both the employer and its insurance carrier. [33 U.S.C. §933(g)(1).] If such approval is obtained, then the amount of the settlement reduces the amount of the employer's liability to the same extent that a judgment would. *Id.* If such approval is not obtained, "all rights to compensation and medical [the LHWCA] *shall be terminated,* regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." *Id.* §933(g)(2); *Peters v. North River Insurance Co. of Morristown, N.J.,* 764 F.2d 306, 311-12 (5th Cir. 1985) (Emphasis in original.)[58]

Despite the clear language of the Fifth Circuit's opin-

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[58] 784 F.2d at 647; Emphasis in original.

ion in *Collier,* the Department of Labor remained unwilling to acceed to the clear judicial interpretation of §933(g).[59] The BRB, in its opinion below, stated:

> We reject employer's argument that *Petroleum Helicopters, Inc. v. Collier,* 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986), *rev'g.,* 17 BRBS 80 (1985) controls the instant case. As employer contends, the Court's opinion contains language to the effect that there is no exception to the written approval requirement of Section 33(g)(1).
>
> The court in *Collier,* however, did not address the case where claimant is not a "person entitled to compensation" or the notice provisions of §33(g)(2). Thus, *Collier* is distinguishable from the instant case.[60]

The BRB continued to focus on its interpretation of "person entitled to compensation" in the context of 33(g) and apparently felt that unless those "magic words" were changed, their interpretation of the statute was still valid. If, however, there was any doubt, it has been removed by the Fifth Circuit's *en banc* decision in *Nicklos Drilling Co. v. Cowart,*[61] which is also its opinion in the instant case.

In *Nicklos,* the Fifth Circuit again addressed the Department of Labor's administrative interpretation of §33(g) in a situation where an employee has settled a claim for an amount *less* than the LHWCA compensation entitlement, without the express written approval of the employer. Both the Department of Labor and Petitioner herein argued that deference should be given the in-house

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[59] *See,* e.g. *Mary E. Barger (Widow of Walter Barger) v. Petroleum Helicopters, Inc. and American Home assurance Company,* Decision and Order, BRB No. 88-101, (November 22, 1989); Appendix "E" to the Petition for Certiorari.

[60] 4 F.2d at 647, 18 BRBS, at 72 (CRT).

[61] 927 F.2d 828 (5th cir. 1991).

administrative interpretation ennunciated in *O'Leary* and its progeny.[62] In examining this contention, the Fifth Circuit first examined general rules of statutory construction and specifically this Court's recent opinion in *Demarest v. Manspeaker,* __U.S.__, 111 S.Ct. 599, 112 L.Ed. 2d 608 (1991), where the Court unanimously declined to give effect to a "longstanding administrative construction" in the face of clear statutory language granting witness fees to incarcerated state prisoners who testify in federal court proceedings:

> When we find the terms of a statute unambiguous, judicial inquiry is completed except in rare and exceptional circumstances. ... We cannot say that the payment of witness fees to prisoners is so bizarre that Congress "could not have intended" it.[63]

Based on this criteria, the Fifth Circuit examined the Department of Labor's contention that the statute was ambiguous and, therefore, its administrative interpretation should be favored. The Department of Labor advanced two arguments: (1) that its interpretation was based on Congressional desire to eliminate the financial hardship attendant to election of remedies; and, (2) that its interpretation was necessary to give meaning to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person."[64] The first argument was rejected. More on point

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[62] Significantly, all of the opinions cited by Petitioner in supporting *O'Leary* are from the BRBS and the Administrative Law Judge. We have found no appellate court which has published an opinion following *O'Leary.*

[63] 927 F.2d at 431-2.

[64] 33 U.S.C. §933(g)(2).

to the case at hand is the Fifth Circuit's statement concerning the second argument, which is the argument advanced by Petitioner herein:

> While superficially persuasive, OWCP's argument cannot stand careful scrutiny. First, the quoted phrase is necessary because it extends the notification requirement to judgments. Second, the quoted phrase requires that the claimant notify the employer of *any* settlement or judgment whatever. As we note above, prior written approval is required only if, as §33(g)(1) provides, the amount of the settlement is "less than the compensatiion to which the [claimant] would be entitled under this chapter." Congress intended to require prior written approval in the limited circumstance where a claimant settles for an amount smaller than his LHWCA compensation entitlement. By contrast, only notification is required when a claimant receives a judgment or settles for an amount exceeding his LHWCA compensation entitlement. Congress' schemes of approval and notification dovetail perfectly; there is no ambiguity.[65]

Accordingly, the Fifth Circuit held as follows:

> After carefully considering the permissibility of OWCP's administrative interpretation in light of the plain language of §33, we conclude that Congress has spoken unambiguously and so as to leave no room for such embroidery. We therefore hold, in accord with the clear terms of the statute, that §33's prior written approval requirement applies regardless of whether the employer or its carrier was paying LHWCA benefits at the time

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65 *Nicklos Drilling Co. v. Cowart*, 927 F.2d at 831-2 (emphasis in original).

of settlement.[66]

The Fifth Circuit's resolution of this issue is clear and unmistakable. It reflects the unambiguous Congressional intent in drafting §33(g). It is in accord with the previous published opinions concerning the entitlement language contained in the LHWCA. The Petitioner's argument to the contrary is not correct. Accordingly, the Petition for Certiorari should be denied.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Petitioner has attempted to argue that the Fifth Circuit's opinion in *Nicklos*[67] is in conflict with what she terms to be the Ninth Circuit's decisions in *O'Leary* and *Bethlehem Steel Corp. v. Mobley*[68] In actuality, there is no conflict; rather, published opinions are clearly in accord.

The opinion of the Benefits Review Board in *O'Leary* was affirmed by the Ninth Circuit. However, that affirmance was by an unpublished opinion. According to the rules of the Ninth Circuit:

> Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders except when relevant under the doctrines of law of the case, *res judicata* or collateral estoppel.[69]

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[66] *Id.*

[67] *Supra.*

[68] 927 F.2d 558 (9th Cir. 1990).

[69] Rule 36-3, United States Court of Appeals (9th Cir.).

Thus, under the clear wording of the Rules of the Ninth Circuit, the unpublished opinion affirming *O'Leary* is not precedent and therefore cannot define the law in that Circuit.

Returning to the Ninth Circuit's opinion in *Bethlehem Steel Corporation v. Mobley,* it is clear after reading the entire opinion (not just those portions cited in the Petition for Certiorari), that the views of the Ninth Circuit dovetail perfectly with those of the Fifth Circuit. In examining the workings of 33(g), the Ninth Circuit stated as follows:

> Section 33(g)(1) requires persons "entitled to compensation" to obtain written permission from their employers before entering into third-party settlement for an amount "less than the compensation" for which they are entitled under the LHWCA. If a claimant fails to obtain an employer's prior written approval of the settlement, the claimant forfeits all rights to compensation and medical benefits under the LHWCA. 33 U.S.C. §933(g)(2).[70]

The Ninth Circuit obviously read both sections of 33(g) together and concluded, as did the Fifth Circuit, that they form one organic whole. The Ninth Circuit, however, determined that §33(g)(1) did not operate to cut off Mobley's benefits because he settled for an amount in *excess* of the compensation to which he was entitled, *not* because he was allegedly not a "person entitled to compensation".[71]

The Ninth Circuit also observed that since Mobley's claim was for only medical benefits, and 33(g) would only apply to claims for compensation, 33(g) would not apply in any event. Accordingly, the Ninth Circuit held that

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[70] *Bethlehem Steel Corp. v. Mobley,* 920 F.2d at 560.

[71] *Id.*

Mobley's claim was not barred under §933(g)(2) as he gave sufficient notice to protect his employer's rights to set off a recoupment under the LHWCA.[72]

It is abundantly clear that the only *published* opinions of the Fifth Circuit and Ninth Circuit (the only circuits to directly address this particular issue), are in accord. In the limited circumstance where an employee settles for an amount *less* than the compensation to which he or she may be entitled, written approval is always required.[73] However, when the settlement is for more than the amount of compensation, notice is all that is required.[74] Accordingly, inasmuch as there is no conflict in the circuits, the Petition for Writ of Certiorari must be denied.

III. THE FIFTH CIRCUIT'S DECISION WILL NOT HAVE DISASTROUS CONSEQUENCES.

Petitioner is attempting to raise a "parade of horribles" in an attempt to sway this Court to grant Certiorari. Not only are the arguments in question specious but, as stated, they fly in the face of the clear wording of the statute.

First, Petitioner argues that the effect of the Fifth Circuit opinion will be to dispossess claimants who relied on *O'Leary* and create claims for reimbursement, as she argues the Fifth Circuit opinion is a new interpretation of existing law. Petitioner's argument misses the point. As discussed *supra*, the interpretation of §33(g) as enunciated by Congress and the Article III courts has not changed. What has been *corrected* is an erroneous administrative in-

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[72] Id. at 561.

[73] *Nicklos, supra*, at 832; *Mobley, supra* at 560.

[74] *Id.; Mobley, supra*, 920 F.2d at 561-2.

terpretation of 33(g) which Congress clearly repudiated by virtue of the 1984 amendments, but which the Department of Labor failed, or was unwilling, to recognize. The point is that Congress, from the legislative history cited *supra*, never intended for that such claimants receive further benefits. They may have received a windfall, but this was against the intent of Congress and contrary to the express wording of the statute.

With regard to pending claims and the argument of economic duress as a result of the opinion below, claimant is again attempting to use the same result oriented argument that has been advanced by the Benefits Review Board and rejected by Congress and the Fifth Circuit. Claimant is also ignoring the fact that, in the statute itself, there are provisions penalizing an employer who does not pay compensation which is due and owing to an employee.[75] Congress has clearly and separately dealt with the matter of economic duress and recalcitrant employers. It is not up to the Department of Labor to broaden the scheme which Congress has so carefully put together by adding penalties which are not found in the statute.

Finally, with regard to future claimants, the situation posited by Petitioner is clearly one which cannot exist. Petitioner refers to employees with occupational diseases who have contracted a disease but who are not currently disabled and are, therefore, not entitled to compensation. Petitioner claims that, since these employees are not disabled, they do not know which future employer to obtain approval from, so they settle their third party cases at their peril under petitioner's interpretation of *Nicklos*. The flaw in petitioner's reasoning is that if the employee is not disabled and therefore not entitled to compensation by definition of the statute, the proscriptions in §33(g) would not apply. The statute requires disability in order for one

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[75] 33 U.S.C. §§914, 938.

to be "entitled to compensation". Claimants in the position advanced by Petitioner will have no worry about the effect of §33(g) when settling their claims, since they will not have invoked the provisions of the Act.

The Fifth Circuit has merely stated what the law is. It has not changed the law, or even clarified it. The Fifth Circuit has merely corrected an erroneous administrative misinterpretation.

CONCLUSION

Respondents submit that Petitioner has advanced no reason to grant certiorari in the captioned case. The legislative history and the statute are clear in meaning. There is no conflict in the circuits and the Fifth Circuit's decision does nothing more than place into effect what Congress intended. The only possible reason to grant certiorari would be to ensure that the law applied by the Department of Labor is that intended by Congress and that the law is uniformly applied across the United States and not subject to administrative whims and abberations, depending on whether or not the claim arises within the geographic and jurisdictional limits of the Fifth Circuit.

Respectfully submitted,

VANCE E. ELLEFSON
C. THEODORE ALPAUGH, III
Ellefson, Pulver & Staines
3838 N. Causeway Boulevard
Suite 3000
Post Office Box 8550
Metairie, La. 70011-8550
Telephone: (504) 833-3433
Attorneys for
Defendants-Respondents